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NO. 85-1688

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JOHNS-MANVILLE SALES CORPORATION

Petitioner,

vs.

MARTHA JO CATHEY and
MARY O. CAVETT, ADMINISTRATRIX,

Respondents.

Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Due Process Clause of the Fourteenth Amendment limits the repeated, cumulative award of punitive damages when thousands of plaintiffs sue one defendant in multiple jurisdictions for a single commercial activity?

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MARTHA JO CATHEY and
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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

The Respondents, Martha Jo Cathey and Mary O. Cavett, respectfully submit this Brief in Opposition to the Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit.

STATEMENT OF THE CASE

This Petition For A Writ of Certiorari arises from two cases involving actions for personal injuries brought against various manufacturers of asbestos-containing insulation products.

The case of Mary Cavett was originally filed in the name of her husband, James O. Cavett, and tried in the United States District Court for the Eastern District of Tennessee. On June 23, 1982, a jury awarded James O. Cavett $800,000.00 compensatory damages and $1,500,000.00 punitive damages against the petitioner, Johns-Manville Sales Corporation. Mr. Cavett died while the appeal to the Sixth Circuit United States Court of Appeals was pending and his wife, Mary Cavett, was substituted as plaintiff-appellee.

The case of Martha Jo Cathey was originally filed in both her name and the

name of her husband, Elmer Lee Cathey, and was tried in the United States District Court for the Middle District of Tennessee against several manufacturers of asbestos-containing products. The jury in that case returned a verdict on June 2, 1982, in favor of Mr. Cathey against the defendant, Johns-Manville, for $12,000.00 in compensatory damages. Prior to trial, in response to a Motion in Limine filed by the defendants to strike plaintiffs' claim for punitive damages, an order was entered granting the defendant's motion on December 11, 1981. Mr. Elmer Lee Cathey died during the pendency of the appeal to the United States Court of Appeals for the Sixth Circuit, and his wife, Martha Jo Cathey was substituted as the sole plaintiff.

The principal issue in both of these cases before the United States

Court of Appeals for the Sixth Circuit was whether under Tennessee Law punitive damages could be awarded in an asbestos-related products liability case. Finding that such damages could be awarded, the Sixth Circuit affirmed the judgment in the Cavett case and reversed the Trial Court in the Cathey case on the issue of punitive damages. The Sixth Circuit went further and found that the evidence adduced at trial was sufficient to support the punitive damage award in the Cavett case and further rejected the fundamental fairness/public policy arguments advanced by Johns-Manville. In rejecting those arguments, the Sixth Circuit specifically relied upon the rationale of Froud v. Celotex Corp., 107 Ill. App. 3d 654, 63 Ill. Dec. 261, 264, 437 N.E. 2d 910, 913 (1982), which stated "we do not believe that a defendant should be relieved

of liability because, through outrageous misconduct, they have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages." (Petitioner's App. 12a-13a.)

SUMMARY OF ARGUMENT

Respondents respectfully assert that because Johns-Manville's petition for writ of certiorari meets none of the considerations elucidated in Rule 17, Rules of the Supreme Court of the United States, the Court has no jurisdiction to review the petition of Johns-Manville.

Respondents further assert that, as adequate safeguards and constraints are already in place within the judicial system such that both procedural and substantive due process are afforded perpetrators, such as Johns-Manville, of mass torts, the Court should decline review and deny the petition of Johns-Manville.

ARGUMENT

(1)

The Petition For Writ Of Certiorari should be denied for lack of basis for granting such a writ pursuant to Rule 17, Rules of the Supreme Court of the United States.

Rule 17.1, Rules of the Supreme Court of the United States, provides:

> **Rule 17. Considerations governing review on certiorari**
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and

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> usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The Petition for Writ of Certiorari fails to satisfy any of the character of reasons enumerated under Rule 17 of the Supreme Court Rules for the granting of such a writ. Rule 17.1(a) allows such a review when a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter, or in conflict on a federal question with a

state court of last resort. There is no conflict between the various federal courts of appeals, and Johns-Manville has failed to cite any such conflict between any federal court of appeals and any state court of last resort.

Similarly under Rule 17.1(b) there is no conflict between state courts of last resort involving any federal question which would justify the granting of the present writ of certiorari. The various federal courts of appeals and state appellate courts which have been presented with the issue of the allowability of repeated punitive damages in asbestos cases have consistently held that they are allowable. Moran v. Johns-Manville Sales Corp., 691 F.2d, 811 (6th Cir., 1982), Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir., 1985), Hansen v. Johns-Manville Products Corporation,

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734 F. 2d 1036 (5th Cir. 1984) cert. denied, 105 S.Ct. 1750 (1985), Neal v. Carey Canadian Mines, Ltd., 548 F.Supp. 357 (E.D. PA, 1982), aff'd sub. nom. Van Buskirk v. Carey Canadian Mines Ltd., 760 F. 2d 481 (3d Cir. 1985), Froud v. The Celotex Corp., 107 Ill. App. 3rd 654, 437 N.E.2d 910 (1982), Fischer v. Johns-Manville Corp., 193 N.J. Super 113, 472 A. 2d 577 (1984), Martin v. Johns-Manville Corp., 469 A. 2d 655 (PA Super 1983), Johns-Manville Sales Corp. v. Janssens, 463 So.2d 242 (FL App. 1984), Thiry v. Armstrong World Industries, 661 P. 2d 515 (Okla., 1983).

Rule 17.1(c) fails to support the writ of certiorari in that no important question of federal law has been presented which should be settled by this Court.

This Court in Silkwood v. Kerr-McGee Corp., 104 S.Ct. 615, 464 U.S. 238 (1984) recognized that punitive damages have long been a part of traditional state tort law. The Court further noted that Congress assumed that traditional principles of state tort law would apply with full force unless they are expressly supplanted by federal legislation. (Silkwood, supra, p. 625) In determining whether or not state law can be pre-empted, the Court relied upon Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n, 103 S.Ct. 1713, 75 L.Ed. 2d 752, (1983):

> As we recently observed in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n. ____U.S.____, 103 S.Ct. 1713 75 L.Ed.2d 752 (1983), state law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. Id., at _____, 103 S.Ct., at 1722; ...If Congress has not entirely displaced state regulation

> over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, ... or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

In the present field of asbestos tort litigation, Congress has evidenced no intent to occupy the field and, therefore, state tort law should control.

(2)

The Repeated Award of Punitive Damages Against The Defendant Does Not Violate The Due Process Clause of the Fourteenth Amendment.

It is important to note at the onset of any discussion concerning propriety of repeated punitive damages that the defendant, Johns-Manville, in its Petition does not contest or question the

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sufficiency of evidence under applicable Tennessee diversity law supporting the award of punitive damages in these cases. The Sixth Circuit specifically found that there was evidence in the record which suggested "that Johns-Manville knew of the tremendous health hazards certain of its products represented and for some twelve or thirteen years refused to even warn the users of these products of the health hazards." (Petitioners' App., p. 15(a), Opinion of the Sixth Circuit.)

Punitive or exemplary damages have been recoverable in Tennessee since 1870. Dougherty v. Shown, 1 Heisk. 302, 48 Tenn. 302 (1870); Knoxville Traction Company v. Lane, 103 Tenn. 376, 53 SW 557 (1899); Stepp v. Black, 14 Tenn.App. 153(1931).

Under Tennessee Tort Law, punitive damages are assessed: 1) to punish the defendant for malicious, wanton, and reck-

less conduct; 2) to deter future wrong-doing by the defendant and others by setting an example for the benefit of the public in general. Honaker v. Leonard, 325 F.Supp. 212 (D.C.Tenn. 1971); Suzore v. Rutherford, 35 Tenn.App. 678, 251 SW 2d 129 (1952); AFL-CIO v. American Metal Products Company, 56 Tenn. App. 526, 408 SW 2d 682 (1964); Booth v. Kirk, 53 Tenn. App. 139, 381 SW 2d 312 (1964); Huckeby v. Spangler, 563 SW 2d 555 (Tenn.1978).

Johns-Manville relies heavily upon the confessed dicta of Judge Friendly in Roginsky v. Richardson-Merrell, Inc. 378 Fed. 2d 832 (2d Cir. 1967) for various "policy arguments" criticizing punitive damages in mass tort cases. These policy arguments often are referred to as the "overkill" theory and have been faced and rejected consistently by the courts to

which they are argued. Toole v. Richardson-Merrell, 251 Cal. App. 2d 689, 715, 60 Cal Rptr. 698-416, (1967); State ex rel Young v. Crookham 290 Or. 61, 618 P.2d 1268 (1980); Moran v. Johns-Manville Sales Corp., 691 F. 2d 811 (6th Cir. 1982); Hansen v. Johns-Manville Products Corporation, 734 F.2d 1036 (5th Cir., 1984); Globus v. Law Research Service, 418 Fed. 2d 1276 (2d Cir., 1969), Wangen v. Ford Motor Company, 97 Wis. 2d 260, 294 NW 2d 437 (1980), see also 14 A.L.R.4th (1).

The Courts and commentators have further acknowledged that the fears expressed by Judge Friendly in Roginski, supra, were more theoretical than real. Although over 1500 suits were filed involving the drug MER/29, only 11 cases were tried to verdict, and of those, the defendant Richardson-Merrrell won four. Reisberg, In Defense of Punitive Damages,

55 NY Univ. Law Rev. #2, May, 1980, p. 340, Owen, Punitive Damages in Products Liability Litigation, 74 Mich. Law Rev. 1258, 1324. Wangen v. Ford Motor Co. infra., p. 26.

Likewise the fears expressed by Johns-Manville in its Petition appear to be more theoretical than real. The filing of the Chapter 11 Reorganization Petition by Johns-Manville (See In Re: Johns-Manville Corporation, 36 B.R. 743, 746 [Bankruptcy S.D. NY, 1984]) was occasioned, not so much by the pending of the personal injury asbestos cases, but by the failure of Johns-Manville and its insurance carriers to resolve differences. Mr. John A. McKinney, Manville's chief executive officer, in an interview immediately following the filing for Chapter 11 Reorganization, stated that at the time of the filing, only one insurance company was

paying on the asbestos claims and only a small portion of each of those claims. As a result, Johns-Manville had filed suit in California in early 1980 against its insurance companies. In discussing the present filing for Chapter 11 Reorganization, Mr. McKinney stated "as much as anything else, the bad faith of insurance companies has made it necessary for us to take this action." Wall Street Journal, Friday, August 27, 1982, p. 29.

Following the filing for Chapter 11 Reorganization, Manville has been successful in settling a great portion of its litigation with its insurance carriers for a sum in excess of $500,000,000.00. Mealey's Litigation Reports-- Asbestos, Volume I, Issue No. 55, May 9, 1986, p. 4,249. In addition, Johns-Manville has continued to post substantial net earnings. For the first quarter of 1986,

Johns-Manville had net earnings of $12,035,000.00 on total revenues of $455,546,000.00. Mealey's Litigation Reports-- Asbestos, Volume I, Issue No. 55, May 9, 1986, p. 4,255.

Notwithstanding the arguments of Johns-Manville, adequate safeguards exist to ensure the protection of any procedural and substantive due process rights afforded under the Fourteenth Amendment. Judicial controls presently exist that can avert any crippling effects from the multiplicity of punitive damage awards. Schuster, Punitive Damages Awards in Strict Products Liability Litigation: The Doctrine, The Debate, The Defenses, 42 OH State Law Journal, 771.

Implicit in any punitive damage award is an initial determination by the trial court as to the sufficiency of the

evidence prior to a charge on punitive damages being given to a jury. Inland Container Corp. v. March, 529 SW 2d 43 (S.Ct., Tenn. 1975); Wangen v. Ford Motor Co., supra, p. 29. Additional constraints on the award of punitive damages are provided by the higher burden of proof necessary in proving such damages over that which is necessary for proving compensatory damages. Johnson v. Huskey Industries, Inc., 536 F. 2d 645 (6th Cir. 1976).

Whether or not punitive damages are to be awarded at all, and if so, the proper amount of such damages is then preeminently for the jury to decide. Coppinger Color Lab, Inc. v. Nixon, 698 SW 2d 72 (Tenn. 1985), p. 74, citing Lichter v. Fulcher, 22 Tenn. App. 670, 125 SW 2d 501 (1938). Through that determination, a jury may consider the effect of multiple

punitive damage awards with regard to the stated goals of punishment and deterrence. State ex rel Young v. Crookman, supra, p. 31. In assessing punitive damage, the wealth of a defendant, evidence of prior and prospective punitive awards and compensatory damage awards may all be considered. Coppinger Color Lab, Inc. v. Nixon, supra, p. 74, citing 9 Tenn. Juris. 68, 69, Damages, §34, 4 Restatement of Torts 2d, §908, Comment e, pp. 466-467.

Further judicial supervision by the Trial Court and the Court of Appeals can protect a defendant from the danger of excessive multiple punitive damage awards. Through the use of remittitur or reversal of a punitive damage award found based upon passion or caprice, a judicial authority can closely monitor any excessive punitive damage award. Courts have not been hesitant in remitting or revers-

ing awards of punitive damages when they were deemed excessive under the circumstances of the individual case. Reisberg, In Defense of Punitive Damages, N.Y.U. Grimshaw v. Ford Motor Co., 119 CA App. 3d 757, 174 Cal. Rptr. 348 (1981).

Johns-Manville, in its petition, attempts to obtain a complete bar of all punitive damages and thereby escape liability for its acts of outrageous misconduct spanning the past fifty years.

The magnitude of the harm and the number of wrongs committed by the defendant, Johns-Manville Sales Corporation, make multiple punitive damage awards appropriate and justified. Judicial constraints are presently in place which adequately protect its rights under both procedural and substantive due process as guaranteed under the Fourteenth Amendment.

The Courts have consistently held that any forms of relief over and above those provided the defendant, Johns-Manville, through judicial constraints should be properly granted by a state or federal legislature, rather than by a judicial tribunal. Roginsky v. Richardson-Merrell, Inc., supra, p. 841, Moran v. Johns-Manville, 691 F.2d 811, (6th Cir., 1982), Jackson v. Johns-Manville Sales Corporation, 750 F.2d 1314 (5th Cir. 1985), Young v. Crookham, 618 P.2d 1268, Wangen v. Ford Motor Company, 294 NW 2d 437.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied and the decision of the Sixth Circuit Court of Appeals be affirmed.

This 22nd day of May, 1986.

RESPECTFULLY SUBMITTED,

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